

PRODEAL SDN BHD*a*

v.

KELIMIS JAYA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR

b

ABDUL AZIZ MOHAMAD J

[WINDING-UP PETITION NO: D2-28-562-1998]

25 MAY 1999

EVIDENCE: *Privilege - Privileged communications - Dispute - Whether present at material time - Whether communications were for purpose of settling dispute*

c

This was the respondent's preliminary objection raised during its application to strike out the winding-up petition filed by the petitioner.

The petitioner had demanded the balance due for goods sold and delivered to the respondent. According to the general manager of the petitioner, the financial controller of the respondent "came to discuss with proposal to settle debts" but the petitioner had rejected the proposal.

d

Thereafter, the petitioner's statutory demand was served on the respondent. The respondent disputed the claim, alleging that the goods supplied by the petitioner were not to specifications.

e

The issue before the court was whether the communications between the financial controller of the respondent and the general manager of the petitioner were privileged.

*f***Held:**

[1] For the privilege to be available, there must have been a dispute, and the communications must have been made for the purpose or with the intention of settling or compromising that dispute.

g

[2] The situation must be one where the party against whom the claim is made takes the stand that he disputes the claim but wishes to come to a settlement or compromise to avoid litigation. If there is just a claim, which the other party does not dispute but offers to settle by some means, the communication of the offer is not privileged.

h

[3] In the present case, there was no dispute at the material date. The evidence was that on that date the respondent proposed a mode of settling its debts. The respondent disputed the debt only after it was served with the statutory demand. The communications on that date were therefore not privileged.

i

[Preliminary objection dismissed.]

a Other source(s) referred to:

Law of Privilege, Suzanne B McNicol, Chap 8

For the petitioner - Shamira Karim Ally; M/s Soo Thien Ming & Nashrah

For the respondent - Balbir Singh; M/s Wan, Balbir & Assoc

b Reported by Ling Hea Hoon

JUDGMENT

Abdul Aziz Mohamad J:

c This is the respondent company's application for the striking out of the winding-up petition in this case. They have raised a preliminary objection that involves the question of privileged communication. To go by references made in submission, the facts that are pertinent to the preliminary objection are as follows.

d The statutory demand for payment of the alleged debt was dated 16 June 1998. The sum demanded was said to be the balance due for goods sold and delivered to the respondent company.

e On 19 June 1998, before the statutory demand was served on the respondents, their Financial Controller, it was said, "came to discuss with proposal to settle debts" but the petitioners did not accept the proposal. That was said in a letter from the petitioners to their solicitors.

On 24 June the petitioners' statutory demand was served on the respondents.

f On 30 June the respondents wrote to the petitioners in response to the statutory demand. They disputed the claim. They said that steel bars supplied by the petitioners were not to specification and that they had, on that account, a greater claim against the petitioners.

g The letter in which the discussion of 19 June was mentioned is exhibited to the petitioners' affidavit dated 18 November 1998, sworn by the petitioners general manager, who, in para. 3(a), repeats in effect what the letter said and says that he was the person whom the respondents' Financial Controller met on 19 June to discuss the settlement proposal. The respondents' preliminary objection is to the admission of that letter and of that paragraph, and also the consequentially related para. 3(b), on the grounds of privileged communication, it being submitted by learned counsel for the respondents that the discussion of 19 June was a privileged communication between the respondents and the petitioners. For the law, passages in Chapter 8 of *Law of Privilege* by Suzanne B. McNicol were cited.

i

According to that chapter, the content of negotiations intended for the compromise or settlement of a dispute is privileged from disclosure. The element of dispute keeps recurring throughout the chapter in relation to compromise or settlement. The privilege is available in the context of a dispute. For the privilege to be available, there must be a dispute, and the communication must be made for the purpose or with the intention of settling or compromising the dispute. The situation must be one where the party against whom the claim is made takes the stand that he disputes the claim but wishes to come to a settlement or compromise to avoid litigation. If there is just a claim which the other party does not dispute but offers to settle by some means, the communication of the offer is not privileged.

In this case, on the facts, on 19 June 1998 there was no dispute. The evidence is that on that date the respondents proposed a mode of settling their debt. The respondents disputed the debt only after being served with the statutory demand. This is confirmed by the respondents themselves in para. 12 of their affidavit dated 7 January 1999 where they say in effect that originally they did not deny their indebtedness to the petitioners and were prepared to settle their debt, and that it was only subsequently, when they became aware of defects in the goods, that they disputed the petitioners' claim.

I rule that, on the evidence, there was no dispute on 19 June 1998 and the communication of that date by the respondents was not for the purpose of settling or compromising a dispute. It was therefore not privileged and I dismiss the preliminary objection.

*a**b**c**d**e**f**g**h**i*